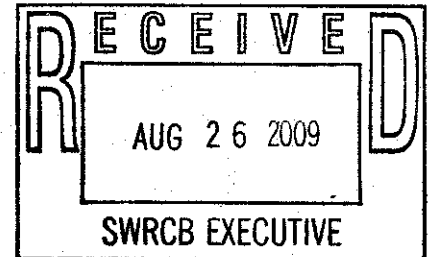


August 26, 2009



VIA E-MAIL COMMENTLETTERS@WATERBOARDS.CA.GOV

Charles R. Hoppin, Chair
State Water Resources Control Board
c/o Jeanine Townsend, Clerk to the Board
1001 I Street
Sacramento, CA 95814

**Re: Comments of Pebble Beach Company Regarding Draft Cease & Desist Order
Against California American Water (Carmel River, Monterey County)**

Dear Chairman Hoppin and Members of the Board:

This firm represents Pebble Beach Company ("PBC") in the above-referenced proceeding. In accordance with the Notice of Public Workshop dated August 13, 2009, PBC respectfully submits these comments regarding the draft cease and desist order (the "draft Order") against California-American Water Company ("Cal-Am").¹

SUMMARY OF COMMENTS

As a result of financial guarantees provided by PBC, a \$68 million wastewater reclamation project ("Reclamation Project") was completed on the Monterey Peninsula in 1994 (Phase I) and 2008 (Phase II). The Reclamation Project converts up to 1,100 acre-feet per year of wastewater into high-quality recycled water used to irrigate the world-renowned golf courses of the Del Monte Forest. Since commencing operation in 1994, the Reclamation Project has saved more than 3.5 billion gallons of potable water.

As part of the transaction to fund the Reclamation Project, PBC and two other "fiscal sponsors" were granted 380 acre-feet per year of Water Entitlements to potable water ("Water

¹Earlier in this proceeding, PBC presented arguments and objections in its pre-hearing brief, orally, in a closing brief, and in a reply to the closing briefs filed by others. PBC incorporates by this reference all of the arguments and objections it has previously raised. Nothing in this comment letter shall constitute a waiver by PBC of any argument or objection previously asserted in this proceeding.

Entitlements") under agreements² with, and permits issued by, the Monterey Peninsula Water Management District ("MPWMD"). Beginning with Order 95-10 and spanning the tenures of two Chiefs of the Division of Water Rights (Edward Anton and Victoria Whitney), PBC received written assurances from the State Board and its staff that the Water Entitlements would be honored. These assurances rested on two key determinations by the State Board and its staff—first, that private financial participation in water infrastructure projects is desirable and should be encouraged as a matter of State water policy and, second, that protection of the Carmel River and its public trust resources is entirely consistent with a commitment to honor the Water Entitlements because exercise of the Water Entitlements will result in no net increase (and in fact will result in a substantial net decrease) in diversions of water from the River.

The draft Order proposes to retreat from fourteen years of State Board policy honoring the Water Entitlements. It concludes in relevant part that "the State Water Board should prohibit any increased diversions from the river by Cal-Am, and should not exclude any deliveries made under PBC's entitlement from MPWMD." (draft Order, p. 54.) If adopted, the draft Order would send a clear signal to the private sector that the State Board and its staff cannot be trusted to honor their commitments and that private participation in water infrastructure projects is a high risk venture in which the rules can be changed after enormous financial investments have been made. Given California's current fiscal condition, the State Board should be promoting private investment in the State's water infrastructure, not creating disincentives for such investment.

The ultimate irony of the draft Order is its punishment of PBC for doing exactly what the draft Order takes Cal-Am to task for not doing—namely, implementing a project that reduces diversions from the Carmel River and increases the water supply available for use on the Monterey Peninsula from sources other than the Carmel River. The draft Order strives mightily—and unconvincingly—to explain why the current State Board is not bound by the previous written determinations of the State Board and the Chief of the Division of Water Rights. But nowhere does the draft Order explain why punishing a private party that was instrumental in the construction of much-needed water reclamation infrastructure and reducing diversions from the Carmel River constitutes sound public policy.

²The PBC portion of the Water Entitlements is 365 afa. The October 3, 1989 Wastewater Reclamation Project Fiscal Sponsorship Agreement (Exhibit PBC-MS2), pursuant to which MPWMD granted PBC the Water Entitlements, was validated under California Code of Civil Procedure §§ 860-870 pursuant to a final Judgment of Validation of the Monterey County Superior Court entered July 12, 1990. The Judgment found that the Sponsorship Agreement and the obligations of MPWMD thereunder are "valid, binding and enforceable in all respects." See Exhibit PBC-5, paragraph 2. In accordance with applicable law, this Judgment is binding on parties involved in this proceeding and the State Board. PBC signed a Supplemental Financing Agreement with MPWMD in 2004. Exhibit PBC-13. Cal-Am also entered into an agreement with PBC in 1990 to guarantee service to the Water Entitlements consistent with the Sponsorship Agreement.

The draft Order is riddled with factual errors, mischaracterizations of the record, inaccurate citations to the evidence, incorrect statements of the law, and misapplication of legal principles. The following is a summary of the main factual and legal errors in the draft Order.

- It blatantly disregards the plain language of Order 95-10, and instead attempts to portray the Water Entitlements as essentially a computing error, saying the Water Entitlements were "based upon what turned out to be an overestimate of the supply of water available to Cal-Am." (draft Order, p. 50.) This statement is patently false. The Water Entitlements were based solely on the amount of potable water (including Carmel River water) saved as a result of the Reclamation Project.
- It re-characterizes and dismisses Footnote 2 of Order 95-10 (which specifically acknowledges and was intended to protect the PBC Water Entitlements) as a "passing recognition" and a "noncommittal footnote." These statements also are patently false. The plain language of Footnote 2 constitutes a commitment by the State Board to honor the Water Entitlements. Additionally, the meaning and effect given Footnote 2 by senior management of the Division of Water Rights completely refutes the draft Order's revisionist interpretation of Order 95-10.
- It criticizes the former Chief of the Division of Water Rights for making commitments with respect to the Water Entitlements, attempting to argue that the Chief's letters did not mean what they clearly said, and if they did, the Chief was without authority, and the letters were "inappropriate." In this regard, the draft Order fails to consider the express terms of Order 95-10, Condition 3(b) which states: "To the extent this requirement [i.e., the 11,285 afa limit on withdrawals from the Carmel River] conflicts with prior commitments (allocations) by the District [MPWMD], the Chief, Division of Water Rights shall have the authority to modify the conservation requirement." (emphasis added).
- It misconstrues the doctrine of estoppel and overlooks the doctrine of laches, both of which constitute complete defenses to the draft Order's arbitrary effects.
- It ignores documentary evidence and testimony of the Prosecution Team itself which affirms that the Water Entitlements were a legitimate and recognized exception to the limit on withdrawals of Carmel River water by Cal-Am in accordance with the commitments of Order 95-10 and two Chiefs of the Division of Water Rights, and that representations to that effect were made to other governmental bodies including the California Public Utilities Commission (not just to a limited number of parties on the Monterey Peninsula).

- It misapplies the law regarding the State Board's power to exercise its enforcement discretion, and improperly distorts public policy.
- It raises, addresses, and purports to decide issues adversely to the Water Entitlements that were never raised or contested by the Prosecution Team or any other party to the proceedings. In other words, the authors of the draft Order have revised history and thereby developed arguments to deny the status of the Water Entitlements. The Prosecution Team did not argue against or contest the position of PBC on the Water Entitlements, and there is no evidence or legal argument in the record to support the position regarding the Water Entitlements taken in the draft Order.

BACKGROUND

As discussed extensively in its (uncontested) testimony and briefs, PBC (and other landowners in the Del Monte Forest) own the Water Entitlements under agreements with, and permits issued by, MPWMD, the agency created by State law specifically to manage water supply on the Monterey Peninsula. The Water Entitlements directly arose from PBC's agreement to underwrite 100 percent of the financial costs to develop the \$68 million Wastewater Reclamation Project jointly undertaken by MPWMD, the Carmel Area Wastewater District ("CAWD"), and the Pebble Beach Community Services District ("PBCSD"). As the single most successful water conservation project in the history of the Monterey Peninsula, the Reclamation Project produces up to 1,100 afa of high-quality recycled water to irrigate the world-renowned golf courses of the Del Monte Forest. Since commencing operation in September 1994, the Reclamation Project has saved over 3.5 billion gallons of potable water from Cal-Am's water supply, primarily from the Carmel River, all at no cost to any public agency or taxpayer due to PBC's private financial support.

In exchange for PBC's agreement to be the sole financial guarantor of the Reclamation Project, MPWMD granted PBC and two other "fiscal sponsors" 380 afa of Water Entitlements, as a vested property right. This Board, in Order 95-10, excluded these Water Entitlements from any cap on Cal-Am's Carmel River diversions. Order 95-10 also gave the Chief of the Division of Water Rights express authority to modify any conservation requirements to the extent such requirements conflicted with any prior commitments by MPWMD, of which the Water Entitlements are assuredly one. On at least four separate occasions since 1995, the Chief of the Division of Water Rights exercised this authority, approving PBC's plans for use of the Water Entitlements, confirming in writing that the Water Entitlements were recognized in Order 95-10, and can be served by Cal-Am over and above any other conservation requirements imposed on Cal-Am. (See letters from Edward Anton dated March 27, 1998, June 5, 1998, and October 18, 2001, and from Victoria Whitney dated April 21, 2004, copies of which are attached to this comment letter as Attachments A, B, C, and D, respectively).

Despite the remarkable conservation achievements of the Reclamation Project, and the consistent, unqualified support for the PBC Water Entitlements by the State Board, the draft Order, astonishingly, without warning, and without any legal or factual basis, proposes to retreat from this Board's fourteen-year commitment to PBC, MPWMD, and other Del Monte Forest landowners to honor and respect the Water Entitlements.

SPECIFIC COMMENTS ON THE DRAFT ORDER

1. The draft Order Misconstrues Order 95-10.

The draft Order's statement that the PBC Water Entitlements were "based upon what turned out to be an overestimate of the supply of water available to Cal-Am" (draft Order p. 50) is false and blatantly ignores Order 95-10. The Water Entitlements were not based at all on the amount of supply available to Cal-Am; they were based on (a) the amount of water saved by the Reclamation Project, (b) the fact that this saved water far exceeded the amount to be used under the Water Entitlements, and (c) the conclusion that the Water Entitlements were the only means of achieving these dramatic savings through private financing of the Reclamation Project.

The draft Order further misconstrues Order 95-10 by dismissing Footnote 2 as only a "passing recognition" of the PBC Water Entitlements and a "noncommittal footnote," a complete misrepresentation of the tenor and import of Footnote 2. (draft Order, pp. 50, 52.) First, to assert that the State Board's recognition of PBC's Water Entitlements amounted to no more than a "noncommittal" reference in the context of a crackdown on Cal-Am's diversions simply ignores reality. On the contrary, the State Board's recognition of the Water Entitlements is an explicit and purposeful exception to the general requirements of Order 95-10. Notably, the draft Order attempts no explanation of why the State Board would now retreat from this explicit exception; instead, the draft Order mischaracterizes the exception as essentially surplusage. This reading of Order 95-10 is inconsistent with both common sense and the rules of legal interpretation, which require that effect be given to all aspects of Order 95-10.

Finally, the draft Order inadequately considers the later conduct of all parties as to the import of Order 95-10's Footnote 2. The Prosecution Team certainly recognized that senior Board staff considered Order 95-10 to embody a recognition of the PBC Water Entitlements as an exclusion from the cap on Cal-Am's Carmel River diversions. In order to justify eliminating the security of the PBC Water Entitlements, however, the draft Order minimizes both the legal and practical significance of later assurances from the Chief of the Division of Water Rights that the Water Entitlements should and would be honored—assurances given pursuant to specific authority granted to the Chief by Order 95-10 itself. *See also* SWRCB Resolution 97-006 (consistent with prior and subsequent delegations, delegating to the Chief the authority to approve water conservation projects pursuant to State Board orders).

The draft Order states, in effect, that the Chief acted both erroneously and without authority in committing (on at least four separate occasions) to PBC, MPWMD, Cal-Am, and

numerous others that the SWRCB would take no enforcement action against Cal-Am for serving the Water Entitlements over and above the 11,285 afa otherwise applicable to Cal-Am under Order 95-10. This statement reveals a total disregard of Order 95-10 on this issue. After setting forth the conservation requirements applicable to Cal-Am, Condition 3(b) of Order 95-10 specifically states that: "To the extent that this requirement conflicts with prior commitments (allocations) by the District, the Chief, Division of Water Rights shall have the authority to modify the conservation requirement." In other words, Order 95-10 itself specifically gives the Chief the authority to do exactly what the Chief did with respect to the Water Entitlements. The Chief's decision is therefore binding on the State Board.

2. **The draft Order Incorrectly Concludes that Reliance by PBC on Order 95-10 and on Later Assurances Was Unjustified.**

Chief Anton's March 27, 1998 letter expressly grounds his confirmation that Order 95-10 recognized and excluded the Water Entitlements from any diversion limitations on the language of Footnote 2 itself. The letter from Chief Anton states: "Under Footnote 2 of Order WR 95-10, the 380 afa is available to serve these projects [in Del Monte Forest]" and "[t]hus, the SWRCB will use its enforcement discretion to not penalize Cal-Am for excess diversions from the Carmel River as long as their diversions do not exceed 11,285 afa plus the quantity of potable water provided to the Pebble Beach Company and other sponsors under this entitlement for use on these lands. This enforcement discretion will be exercised as long as the wastewater reclamation project continues to produce as much as, or more than, the quantity of potable water delivered to the Del Monte Forest property, and the reclaimed water is utilized on lands within the Cal-Am service area." (Exhibit PBC-7, p. 2.)

There is nothing unclear or ambiguous about the language of Mr. Anton's March 27, 1998 letter. Notably, the letter's citation to Order 95-10 demonstrates that the Chief understood the import of Footnote 2 in an entirely different way than represented by the draft Order. In fact, the draft Order tries to downplay the significance of Footnote 2 in order to undercut the authority of the Chiefs' letters, as though the Chiefs' explanation of the PBC exclusion had no concrete basis in Board policy. But as pointed out above, the Chief was granted the express authority by the Board in Order 95-10 to modify diversion limits in order to recognize prior MPWMD commitments such as the Water Entitlements.

The draft Order characterizes Mr. Anton's letters as renegade communications which didn't mean, or at least shouldn't have meant, what they said. This mischaracterization ignores subsequent representations made by other senior management of the Division of Water Rights. For example, Victoria Whitney, former Chief of the Division of Water Rights and current Deputy Director for Water Rights, wrote a letter dated April 21, 2004 in which she quoted with approval from Chief Anton's March 27, 1998 letter and stated very clearly and without qualification that: "This enforcement discretion will continue to be exercised as long as the

amount of treated wastewater delivered for use meets or exceeds the quantity of potable water delivered under the entitlement." (emphasis added).

Significantly, the Prosecution Team itself submitted evidence of the manner in which the State Board represented its position on the Water Entitlements to other governmental agencies and individuals. As cited in PBC's Closing Brief, the Prosecution Team presented evidence regarding the State Board's commitment to honor the Water Entitlements (a) to the California Public Utilities Commission in a Prehearing Conference Statement signed by Executive Director Walt Pettit (Exhibit PT-8); (b) to MPWMD and others seeking relief from the Order 95-10 limits (Exhibit PT-6); and (c) in this very proceeding, in testimony by Katherine Mrowka.³ All of this evidence is completely ignored in the draft Order.

Mr. Anton's March 27, 1998 letter sets forth criteria for the Water Entitlements' exclusion to remain in place—principally that the Reclamation Project must produce as much or more water than the quantity of water to be used under the Water Entitlements. Importantly, the 1998 letter states these criteria separately from the various other restrictions and conditions imposed on Cal-Am in Order 95-10 (developing an alternative or permitted supply, developing a water supply plan, etc.). Nowhere does the draft Order find that these criteria have not been satisfied, and, in fact, the evidence in the record is uncontested that the criteria have at all times been satisfied: a net reduction in Carmel River diversions has consistently been achieved as a result of PBC's efforts.

Finally, the draft Order mischaracterizes PBC's expectations concerning the exclusion of its Water Entitlements from any cap on Cal-Am diversions and misapplies the legal doctrine of estoppel. The draft Order asserts that "even if the letter had purported to promise that there would be no enforcement, it would not be binding" because it would violate public policy. (draft Order, p. 53.) What PBC expects and has relied upon, however, is that so long as the Water Entitlements satisfy the requirements contained in the Chiefs' letters, then the State Board will continue to honor the Water Entitlements. PBC and many others have reasonably and detrimentally relied on the Board's repeated written commitments relative to the Water Entitlements, and the Board is estopped from undercutting the significant financial investments that reliance has produced.

Just this year the California Supreme Court confirmed an axiom of administrative law related to an agency's interpretation of a statute it administers: "When an administrative

³ Ms. Mrowka's written testimony in Phase I, discussing the 11,285 afa diversion limit, stated: "the State Water Board had already acted favorably regarding development of the Pebble Beach Wastewater Reclamation Project. . . . Since the Pebble Beach interests used treated wastewater in lieu of potable water from the Carmel River, the State Water Board found that the net diversion from the Carmel River to serve project lands would be less than the level that would have occurred if the wastewater reclamation project had not been developed. Thus, on March 27, 1998, the State Water Board determined that Order WR 95-10 provided for the development of this project." (Exhibit PT-2, pp. 5-6.)

interpretation is of long standing and has remained uniform, it is likely that numerous transactions have been entered into in reliance thereon, and it could be invalidated only at the cost of major readjustments and extensive litigation." *Ste. Marie v. Riverside County Regional Park and Open-Space Dist.* (2009) 46 Cal.4th 282, 292-293 (cited reference omitted). From this principle, an agency's dealings with a regulated entity or individual can give rise to equitable estoppel and laches.

The draft Order at page 53 states that the State Board's repeated approval of PBC's Water Entitlements cannot be understood to create a "binding commitment" by the Board. As discussed herein, the Board's long-held position regarding the Reclamation Project is found in statements other than Order 95-10 and the letters of Chief Anton.⁴ Here the doctrines of equitable estoppel and laches preclude the State Board from now changing its position with respect to the Water Entitlements.

"The doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment." *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489 (cited reference omitted). In *Mansell*, the California Supreme Court set forth the following formula: "The government may be bound by an equitable estoppel in the same manner as a private party," if the elements of estoppel are met and "the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." *Id.* at 496-497.

The doctrine has been applied in environmental cases. In *People v. Department of Housing & Community Development*, the court applied the balancing test articulated in *Mansell* and concluded that a construction permit, issued without compliance with CEQA but relied upon under the "assumption that the [issuing] agency had met its [environmental] responsibilities," could not be revoked:

⁴ See also: (1) Exhibit PT-6 ("[t]he SWRCB has already acted favorably on one issue identified [by the MPWMD]. The developers of the Pebble Beach Water Reclamation Project sought SWRCB approval to utilize 380 afa of Carmel River water made available as a result of developing the wastewater reclamation project . . . the SWRCB determined that Order WR 95-10 provided for development of this project"); (2) Exhibit PT-8 ("SWRCB has allowed the development of the Pebble Beach Water Reclamation Project to utilize 380 afa of Carmel River water made available as a result of developing the wastewater reclamation project"); and (3) 2004 letter from V. Whitney (attached hereto as Attachment D), recognizing PBC's plan to expand the Reclamation Project and transfer a portion of the Water Entitlements to other property owners, and referring to diversions for use by PBC as one of the "qualifying exemptions for diversions in excess of 11,285 afa").

Consistent policies . . . are vital to the avoidance of bureaucratic entanglements. There is little good in protecting the environment for the sake of a society which fails to insist on fair treatment of its citizens. . . [T]he applicant citizen . . . commenced his project, incurring substantial expenses and losses over a period of months; only then did the state . . . seek judicial action to annul what it had once granted; the citizen's losses are largely irrecoverable; the project is . . . not recognizable as a gross despoliation of the environment. The state's failure to commence its suit before the citizen incurred heavy loss created an injustice which outweighs any adverse effect of the state's failure to make timely environmental inquiries.

(1975) 45 Cal.App.3d 185, 200.

The draft Order on page 53 cites to *Phelps v. State Water Resources Control Board*, concluding that the State Board cannot be enjoined from reversing its representations made to PBC and the MPWMD for fourteen years. That case is not applicable here. In *Phelps*, landowners relied on notes written by State Board staff in inspection reports and license checks. Some of the notes indicated that when the Board's Term 91 went into effect, the landowners could revert to using riparian water rights. The court found that the element of "reliance" was not present, first because the notes reflected only staff assumptions and did not purport to determine the validity of riparian water rights, and second because the notes amounted to unauthorized legal representations by agency staff, which cannot provide the basis for estoppel against an agency. There were no such untoward "assumptions" here, nor were there unauthorized legal representations. The determinations obtained from the State Board by PBC, Cal-Am, and MPWMD, came straight from the Chief, Division of Water Rights, who had clear authority under Order 95-10 to honor the Water Entitlements.

As in this instance, when a "rare combination of government conduct and extensive reliance" leads landowners to believe, and to act upon their belief, that their property interests are relatively certain, justice requires that the government be bound by its pronouncements. *Mansell, supra*, 3 Cal.3d at 500-501 (also considering the public benefits associated with plaintiffs' conduct); see also *City of Imperial Beach v. Algert* (1962) 200 Cal.App.2d 48, 52 (a "special combination of circumstances," namely government conduct, demanded application of the principles of estoppel).

The defense of laches is related to estoppel, and it applies where, as here, there has been an "unreasonable delay plus either acquiescence in the act about which the complainant complains or prejudice to the party asserting the equitable defense resulting from the delay." *Wells Fargo Bank v. Goldzband* (1997) 53 Cal.App.4th 596, 628-629 (cited references omitted). As with estoppel, considerations of public policy are applied where laches is asserted against a government agency which has not diligently prosecuted a proceeding. *Id.* Certainly here, the State Board unreasonably delayed in waiting fourteen years before giving any indication that PBC's development of new water through the Reclamation Project would not, in fact, guarantee its Water Entitlements.

The record is replete with evidence of the State Board's "acquiescence" and PBC's and hundreds of other landowners' prejudice. The draft Order asserts, however, that a violation of "public policy" will ensue if the commitments are honored. No such violation (if indeed one occurs at all) could outweigh the grave unfairness of the State Board's proposed change in policy and position, especially when balanced with the public policies served by PBC's development of new water supplies and reduction of Carmel River diversions for the Monterey Peninsula. That the Board chose for many years to support the advancement of one policy, and now proposes to invoke another as a justification for defeating the sound reliance interests it engendered many years ago, is unconscionable and an unlawful abuse of agency discretion.

3. The draft Order Misconstrues the Nature and Impacts of the Water Entitlements.

The draft Order incorrectly characterizes the Water Entitlements' exclusion from the Cal-Am 95-10 diversion cap as an "increased diversion." (draft Order, p. 54.) Throughout the draft Order's discussion of the PBC exclusion, there is never a distinction drawn between diversions supplying the PBC Water Entitlements and Cal-Am's "excessive" diversions generally. There is no basis for this misleading description. As noted above, the draft Order entirely disregards the fact that the conditions for excluding the Water Entitlements have been met. And more importantly, the draft Order's characterization ignores the fact that the Water Entitlements were approved and excluded because PBC had contributed to a net decrease in Carmel River diversions.

The draft Order states that "[s]uch an exclusion might have been reasonable if it appeared the [sic] Cal-Am was likely to come into compliance reasonably soon, and if the harm during the period required to come into compliance was relatively small, but that is not the case here." (p. 52). This reasoning once again fails to recognize that the exclusion was based on a significant net saving of potable water; that it promoted public and environmental benefits; and that it was tied to the condition of ongoing net savings of potable supply. These considerations were expressly identified in the Chiefs' letters.

Oddly, the draft Order is entirely premised on Cal-Am's alleged violations of conditions unrelated to those underlying the PBC exclusion, and yet the draft Order provides no explanation for enforcing those unrelated conditions against the PBC Water Entitlements. No reason exists, and none is cited in the draft Order, for ignoring the difference between the potential harm from Cal-Am's overall diversions and the lack of "harm" that will result from use of the small amount of potable water supply contemplated in the Water Entitlements.

4. The draft Order Lacks Internal Consistency and Fails to Provide an Adequate Legal Basis for Eliminating the PBC Exclusion.

Based on the draft Order's many internal inconsistencies and flawed logic, it is difficult to avoid the conclusion that the PBC Water Entitlements are being arbitrarily targeted. At least

four of the draft Order's inconsistencies are significant enough to undercut the legal basis of the draft Order.

First, the draft Order confuses the nature of the Board's enforcement discretion, asserting in one breath that the nature of enforcement is "highly discretionary," and then stating in the next breath that it is *not* discretionary because "[i]t would violate public policy to enjoin the State Water Board from enforcing the laws it is charged with administering" and that honoring PBC's "understandable" expectation "that it could count upon undiminished deliveries from the Carmel River . . . would amount to an abdication of the State Water Board's responsibilities for proper administration of water rights." This is nonsensical. The exercise of agency discretion can include declining any enforcement measures at all. *Sutherland v. City of Fort Bragg* (2000) 86 Cal.App.4th 13, 24. The "very essence of discretion is the power to make comparisons, choices, judgments, and evaluations." *Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 908 (cited reference omitted). The State Board is in no way bound to treat every diversion alike under the solution it adopts through this proceeding.

Second, the draft Order arbitrarily attempts to distinguish the proposed treatment of the PBC Water Entitlements from the proposed treatment of the water entitlement of the City of Sand City. There is no practical difference whatsoever between the two; yet the draft Order (rightfully) respects and allows the Sand City water entitlement to be used for new growth without counting against Cal-Am Carmel River diversions, while denying that same status to the PBC Water Entitlements. The draft Order notes (p. 55) that "Sand City independently made an effort to develop water for growth," that it "sought assurances from the State Water Board that any new water it developed would not be reduced to offset Cal-Am's illegal diversions from the river," that it received those assurances in a letter from State Board staff, and that those assurances would be respected in the draft Order. Sand City's new water comes from a 300 afa desalination plant, whereas PBC's Water Entitlements come from a \$68 million, 1100 afa recycled water project.

It is no answer to say (as the draft Order seems to) that Sand City's desalination project arose after Order 95-10, whereas the Reclamation Project was instituted before Order 95-10, because that is factually incorrect—in fact, the Reclamation Project did not have its first full year of producing its dramatic water savings until the end of Water Year 1995, after Order 95-10 was adopted. And Phase II of the Reclamation Project began full operation in 2008, saving an additional 300 afa on average over the initial 700 afa savings from Phase I. PBC financed the \$34 million cost of Phase II after receiving two additional written assurances from the Chief of the Division of Water Rights that the Water Entitlements would continue to be honored by the SWRCB (the 2001 Anton Letter and the 2004 Whitney Letter, Attachments C and D). The differing treatment of the Sand City water entitlement and the PBC Water Entitlements by the draft Order is, again, proof of the draft Order's arbitrary and unsupportable treatment of PBC Water Entitlements.

Third, the draft Order finds that honoring the Water Entitlements would impede State Board policies requiring the protection of public trust resources and taking "vigorous actions" to prevent unlawful diversions. Strangely, sitting like an elephant in the room, is the unmentioned policy of the State Board favoring water recycling. As the California legislature has recognized, recycled water "is suitable for direct beneficial use . . . that would not otherwise occur and is therefore considered a valuable resource." Water Code § 13050(n). The law commands the state to "undertake all possible steps to encourage development of water recycling facilities so that recycled water may be made available to help meet the growing water requirements of the state." Water Code §§ 13510-13512. The State Board shares jurisdiction over the use of recycled water. Just this year the Board adopted a Recycled Water Policy that reasserts its commitment to supporting recycled water projects. *See* State Board Resolution No. 2009-0011 (Feb. 2, 2009, policy effective May 14, 2009). The Recycled Water Policy states that the Board strongly encourages water recycling and will exercise its authority "to the fullest extent possible to encourage the use of recycled water." The draft Order's failure to address this key policy is inexplicable.

Finally, the draft Order purports to rely on evidence and arguments that were never presented by the Prosecution Team or any other party. One can scour the record in vain attempting to find any evidence or argument raised by the Prosecution Team supporting the draft Order's factual and legal analysis. Specifically, there is nothing in the record to support the draft Order's contentions that the "PBC water entitlement . . . was based upon what turned out to be an overestimate of the supply of water available to Cal-Am;" that Footnote 2 of Order 95-10 was only a "passing recognition" and "noncommittal footnote" concerning the PBC Water Entitlements; that the March 27, 1998 letter from Chief Anton of the Division of Water Rights making commitments with respect to the Water Entitlements was "inappropriate;" that the Chief, Division of Water Rights, did not have the authority to exclude the PBC Water Entitlements from the other limitations placed upon Cal-Am's withdrawals from the Carmel River; that the second letter from Chief Anton of October 18, 2001 "subjects Cal-Am's diversions from the river for PBC properties to future State Water Board decisions" (a false interpretation by the draft Order); that if the State Board issues a letter "to promise that there would be no enforcement," it is "doubtful whether any [such] correspondence . . . may be relied on" and that "it would not be binding;" and that "honoring that [understandable] expectation [of PBC] would amount to an abdication of the State Water Board's responsibility for proper administration of water rights."

These are not arguments that came from the Prosecution Team. To the contrary, the Prosecution Team submitted evidence indicating exactly the opposite of what the draft Order asserts. For example, the Prosecution Team submitted documentary evidence in the form of a Prehearing Conference Statement of the State Board to the California Public Utilities Commission (Exhibit PT-8) which states:

The SWRCB has allowed the developers of the Pebble Beach Wastewater Reclamation Project to utilize 380 afa of Carmel River water made available as a result of developing

the wastewater reclamation project. Since the Pebble Beach interests use treated wastewater in lieu of potable water from the Carmel River; the SWRCB found that the net diversion from the Carmel River to serve project lands will be less than the level that would have occurred if the wastewater reclamation project had not been developed. This determination modified the 11,285 afa water conservation goal by the amount of Carmel River water actually used for the Pebble Beach project on a yearly basis.

This statement was signed by Walt Pettit, the former Executive Director of the State Board; it certainly is not "noncommittal" as the draft Order suggests about Footnote 2. Nor is it "inappropriate" in any respect.

Katherine Mrowka, Senior Engineer for the Division of Water Rights, was called as a witness by the Prosecution Team. She testified at the hearing as follows:

Mr. Jamison: "And with your testimony in those exhibits, Ms. Mrowka, I'd just like to ask you again to confirm that that's your understanding of the facts in this proceeding.

Ms. Mrowka: "My understanding of the facts in this proceeding is consistent with the footnote in Order 95-10." (Hearing Transcript (Phase I), June 19, 2008 at 54:14-19.)

PBC, at the conclusion of the State Board hearing, submitted a 14-page Closing Brief and a 10-page Reply Brief citing the evidence and legal analysis supporting the Water Entitlements, and pointing out that there was no evidence controverting PBC's evidence on the Water Entitlements. Neither the Prosecution Team nor any other party in their closing or reply briefs disputed or contested PBC's position on the evidence or the arguments in this regard. The Prosecution Team never presented any evidence that the Water Entitlements should not be afforded the same treatment as had been consistently given by the Board, never suggested that Footnote 2 in Order 95-10 was irrelevant, and never suggested that the Chief of the Division of Water Rights lacked authority to make the commitments that he/she made with respect to the PBC Water Entitlements. In its closing and reply briefs, the Prosecution Team never even mentioned the PBC Water Entitlements.

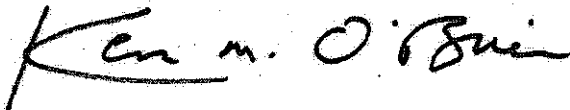
Under these circumstances, the draft Order violates the most basic tenets of due process, under which a quasi-adjudicatory body such as the State Board is precluded from deciding issues that were not raised or contested by the parties and on which no disputed factual evidence has been presented. (Water Code § 1834 requires that notice of a cease and desist order "contain a statement of facts and information that would tend to show the proscribed action.") The draft Order's reliance on facts not in evidence and legal arguments never raised or presented by the parties or State Board staff is therefore improper and illegal.

RECOMMENDED ACTION

PBC respectfully requests that the draft Order be modified and re-issued for further public review and comment to provide that the Water Entitlements should be excluded from restrictions on diversions of water from the Carmel River, consistent with the terms of Order 95-10, especially Footnote 2, and other applicable law.

Very truly yours,

DOWNEY BRAND LLP



Kevin M. O'Brien

KMO:cjb

Attachments

cc: Attached Interested Parties List

1024617.1

ATTACHMENT "A"



Cal/EPA

State Water
Resources
Control Board

Division of
Water Rights

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Sacramento, CA
95812-2000

901 P Street
Sacramento, CA
95814
(916) 657-1359
FAX (916) 657-1485

EXHIBIT PBC-7

M.P.W.M.D.

R MAR 30 1998 **D**
R E C E I V E



Pete Wilson
Governor

MARCH 27 1998

Mr. Darby Fuerst
Monterey Peninsula Water
Management District
P.O. Box 85
Monterey, CA 93942-0085

Mr. Larry Foy
California American Water Company
P.O. Box 951
Monterey, CA 93942-0951

Dear Sirs:

RECLAMATION PROJECT WATER AVAILABILITY – CARMEL RIVER IN MONTEREY COUNTY

In response to a November 14, 1997 request by the Del Monte Forest Property Owners organization this letter addresses the availability of 380 afa to serve development under the water entitlement granted by the Monterey Peninsula Water Management District (District) to sponsors of the Carmel Area Waste Water District (CAWD) – Pebble Beach Community Services District (PBCSD) wastewater reclamation project and its relation to SWRCB Order 95-10.

SWRCB Order WR 95-10 refers to the entitlement granted by the District and development of the Del Monte Forest property. Footnote 2 of the Order states:

“The (Wastewater Reclamation) Project will provide 800 af of reclaimed water for the irrigation of golf courses and open space in the Del Monte Forest. In return for financial guarantees, the Pebble Beach Company and other sponsors, received a 380 af potable water entitlement from the District, based upon issuance of an appropriative right permit to the District, for development within Del Monte Forest.”

The wastewater reclamation facility operated by the CAWD is presently producing more than 800 afa of reclaimed water annually for use upon golf courses and open space areas. Use of treated wastewater has reduced the potable water deliveries of California-American Water Company (Cal-Am) for this irrigation project by at least 500 afa. The SWRCB understands that improvements are being considered that may allow reduction of potable water use by the full 800 afa.



Our mission is to preserve and enhance the quality of California's water resources, and ensure their proper allocation and efficient use for the benefit of present and future generations.

Mr. Darby Fuerst
Mr. Larry Foy

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MARCH 27 1998

The SWRCB has recognized that the Pebble Beach Company and other sponsors were project participants in, and assisted in funding, the wastewater reclamation project which enabled Cal-Am to reduce its delivery of potable water to the Del Monte Forest property and thereby reduce the demand on the Carmel River by at least 500 afa and potentially 800 afa. Upon completion of the development project on the Del Monte Forest property, 380 afa will be diverted from the Carmel River by Cal-Am for delivery to these lands. Thus, there will be no net increase in Carmel River diversions in the future over the level of past documented diversions as a result of developing these projects. As a result of the reclamation project and especially during the interim period while the Del Monte Forest property is being developed, the net diversion from the Carmel River to serve the Del Monte Forest properties will be less than the level that would have occurred if the wastewater reclamation project had not been developed. Thus, under Footnote 2 of Order WR 95-10, the 380 afa is available to serve these projects.

As a result, Order WR 95-10 does not preclude service by Cal-Am to the Del Monte Forest property under the 380 afa entitlement granted by the District. As you are aware, the SWRCB is requiring Cal-Am to maintain a water conservation program with the goal of limiting annual diversions from the Carmel River to 11,285 afa until full compliance with Order WR 95-10 is achieved. While Cal-Am has been exceeding the limit, it is not the intent of the SWRCB to penalize the developers of the wastewater reclamation project for their efforts to reduce reliance upon the potable water supply via utilization of treated wastewater.

Thus, the SWRCB will use its enforcement discretion to not penalize Cal-Am for excess diversions from the Carmel River as long as their diversions do not exceed 11,285 afa plus the quantity of potable water provided to Pebble Beach Company and other sponsors under this entitlement for use on these lands. This enforcement discretion will be exercised as long as the wastewater reclamation project continues to produce as much as, or more than, the quantity of potable water delivered to the Del Monte Forest property, and the reclaimed wastewater is utilized on lands within the Cal-Am service area.

Footnote 2 of Order WR 95-10 deals only with the issue of water use for purposes of projects in the Del Monte Forest. Consequently, the order does not provide discretion to address any projects involving the use of the unassigned 420 afa (800 afa minus the 380 afa identified in the footnote equals 420 afa) developed by the wastewater treatment facility.

In order to accurately document that only the historic level of diversion has been maintained, the District is requested to advise the SWRCB of both the quantity of potable water obtained from Cal-Am on a monthly and total annual basis to serve these lands. Information on both monthly

MARCH 27 1998

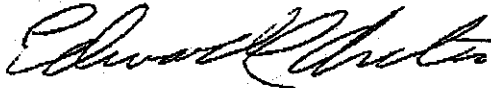
Mr. Darby Fuerst
Mr. Larry Foy

-3-

and total annual production and beneficial use from the wastewater treatment project should also be included in the submittal. This information should be submitted quarterly, and the annual data should document use during the water year. The water year begins on October 1 of one year and ends on September 30 of the subsequent year.

If you have any questions regarding this matter, I can be contacted at (916) 657-1359.

Sincerely,



Edward C. Anton, Chief
Division of Water Rights

cc: Mr. Robert C. Gross
Del Monte Forest Property Owners
P.O. Box 523
Pebble Beach, CA 93953



Our mission is to preserve and enhance the quality of California's water resources, and ensure their proper allocation and efficient use for the benefit of present and future generations.

ATTACHMENT "B"

State Water Resources Control Board

John P. Caffrey, Chairman



ter M. Rooney
Secretary for
Environmental
Protection

Division of Water Rights

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Mailing Address: P.O. Box 2000 • Sacramento, California • 95812-2000



Pete Wilson
Governor

JUN 05 1998

Mr. Darby Fuerst
Monterey Peninsula Water Management District
P.O. Box 85
Monterey, CA 93942-0085

Dear Mr. Fuerst:

REQUEST FOR MODIFICATION TO STATE WATER CONTROL BOARD ORDER (SWRCB) WR 95-10 – CARMEL RIVER IN MONTEREY COUNTY

By letter dated April 16, 1998, the Monterey Peninsula Water Management District (District) requested relief from the water conservation goal of 11,285 acre-feet per annum (afa) for diversion from the Carmel River system as established by the SWRCB in Order WR 95-10. The District seeks authorization for the California-American Water Company (Cal-Am) to increase its diversions from the Carmel River to 13,641 afa. The request for relief is based upon the following language from Order WR 95-10:

“To the extent that this requirement conflicts with prior commitments (allocations) by the District, the Chief, Division of Water Rights shall have the authority to modify the conservation requirement.”

As explained below, I cannot grant the requested relief under this authority. The District states that it has made prior commitments to existing Cal-Am customers to allow an annual allocation of 17,641 af. Of this total, 13,641 afa must come from the Carmel River. Accordingly, the District asks that the Division of Water Right (Division) use its authority to modify the conservation requirement and enable Cal-Am to utilize additional water. In the event that the Division does not exercise its discretion to accommodate this increase in diversion in all future years, the District nonetheless requests that the delegated authority be utilized to authorize an increase in diversion for the 1998 water year.

Apparently, the District is concerned that the Public Utilities Commission may act upon Cal-Am's request to institute mandatory rationing in order to limit total diversions to the 11,285 afa specified in the Order if the Division fails to modify this requirement. Such an action will impact local water users without, per the District, a commensurate benefit to the environment. Furthermore, the District maintains that the SWRCB's water conservation goal is inconsistent with water use planning undertaken by the District.

JUN 05 1998

By letter dated April 29, 1998, I requested additional information from the District to support the request for relaxation of the provision. The May 15, 1998 response from the District lists the quantities of water that the District has allocated from the Seaside groundwater basin, documents the quantity of water that the District has authorized for use on an annual basis from 1995 through 1998, and provides information on the retrofit credit program.

The information regarding the Paralta well allocations documents that the District allocated 192.3 afa from the Seaside groundwater basin in July 1995. Order WR 95-10, page 33, states that the Cal-Am Seaside basin production was approximately 2,700 afa. Adding the 192.3 afa to this quantity, the total 1995 commitment (based on allocations and existing diversions only) was 2,892.3 afa. This is significantly less than the Cal-Am 1997 water year production of 4,025 af from the Seaside groundwater basin, as documented in the May 15 letter.

The delegation of authority in Order WR 95-10 only pertains to commitments (allocations). There is no delegation of authority to address the pre-Paralta credits, retrofit credits or entitlement issues. Nonetheless, it appears that water use by the last three parties listed in the entitlement column of item (2) in your May 15 letter, Macomber Estates, Griffin Trust and Pebble Beach Company, has been addressed by the SWRCB. Please refer to the discussion of the Pebble Beach Wastewater Reclamation Project at the end of this letter.

Order WR 95-10 requires Cal-Am to maximize production from the Seaside aquifer for the purpose of serving existing connections, honoring existing commitments (allocations), and to reduce diversions from the Carmel River to the greatest practicable extent. (Order WR 95-10, condition 4) After that resource is fully utilized, the Division is delegated authority to increase the 11,285 afa water conservation goal as stated above. The delegation of authority only pertains to those District commitments in place prior to the July 6, 1995 adoption of Order WR 95-10. The information we have received does not support modification to the 11,285 afa water conservation goal because the quantity made available by development of the Paralta well in the Seaside aquifer (4,025 afa) far exceeded the 2,892.3 afa quantity committed (allocated) by the District prior to July 6, 1995. Thus, there is no basis for adjusting the Carmel River water conservation goal.

Furthermore, the purpose for including the provision about existing commitments in the Order was to ensure that a partially completed hotel project under construction at the time of adoption would have a water supply available to it. During the May 20, 1998 Water Awareness Forum of the Monterey Commercial Property Owners Association, I learned that the hospitality industry utilizes approximately the same quantity of water today as it did in 1995. Thus, despite any changes in visitor days that may have occurred between 1995 and the present, water use by this industry does not appear to have affected the ability of Cal-Am to comply with Order WR 95-10.

Most importantly, I believe that the delegation to the Division only extends to providing relief if the total water available from the Carmel River plus the water available from the Seaside aquifer is not sufficient to meet a demand equal to water use in water year 1995 plus the water use by

JUN 05 1998

facilities: (1) under construction at the time of adoption; or (2) constructed subsequent to adoption of Order WR 95-10 which had received a water allocation from the District prior to adoption of Order WR 95-10. As noted in your May 15 letter, total water use in the 1995 water year was 13,830 af. Under the provisions of Order WR 95-10, Cal-Am could utilize 11,285 af from the Carmel River plus 4,000 af from the Seaside aquifer for a total of 15,285 af. Thus, in the 1995 water year Cal-Am could have utilized 1,455 af more than it did, which is significantly more than the District's 1995 allocation of 192.3 afa from the Seaside groundwater basin.

The SWRCB has already acted favorably on one issue identified in your April 16 letter. The developers of the Pebble Beach Wastewater Reclamation Project sought SWRCB approval to utilize 380 afa of Carmel River water made available as a result of developing the wastewater reclamation project. Since the Pebble Beach interests use treated wastewater in lieu of potable water from the Carmel River; the SWRCB found that the net diversion from the Carmel River to serve project lands will be less than the level that would have occurred if the wastewater reclamation project had not been developed. On March 27, 1998, the SWRCB determined that Order WR 95-10 provided for development of this project.

Finally, the District asserts that the water conservation goal is inconsistent with water use planning efforts of the District. The SWRCB is the State agency responsible for administering the appropriative water right system. The SWRCB order is only an interim measure to provide some relief during development of a water supply project, and does not provide a basis of right for continued diversion of water. Failure to quickly address the water supply situation could result in the need for further action by the SWRCB. Thus, the District should tailor its water use planning efforts to ensure consistency with the provisions of Order WR 95-10.

If you require further assistance, I can be contacted at (916) 657-1359. Katherine Mrowka is the staff person presently assigned to this matter, and she can be contacted at (916) 657-1951.

Sincerely,
ORIGINAL SIGNED BY

Edward C. Anton, Chief
Division of Water Rights

cc: California-American Water Company
Mr. Larry Foy
50 Ragsdale Drive, Suite 100
Monterey, CA 93940

Ms. Linda Horning
Office of Senator Bruce McPherson
7 John Street
Salinas, CA 93901

bc: Walt Pettit
SWRCB Board Members

ATTACHMENT "C"

10/26/01 FRI 16:41 FAX 931 790 3455

LOMBARDO & GILLES

MICHAEL WATER

0000

Winston E. Hinkox
Secretary for
Environmental
Protection**State Water Resources Control Board****Division of Water Rights**1001 I Street, 14th Floor • Sacramento, California 95814 • (916) 341-2568
Mailing Address: P.O. Box 2000 • Sacramento, California • 95813-2000
FAX (916) 341-5400 • Web Site Address: <http://www.waterrights.ca.gov>Gray Davis
Governor*The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Web-site at <http://www.swrcb.ca.gov>.*

OCT 1 8 2 01

Mr. Ernest A. Avila
Monterey Peninsula Water
Management District
P.O. Box 85
Monterey, CA 93942-0085

Dear Mr. Avila:

PEBBLE BEACH PROJECT - USE OF RECLAIMED WASTEWATER FROM THE CARMEL AREA WASTEWATER DISTRICT/PEBBLE BEACH COMMUNITY SERVICES DISTRICT (CAWD) WASTEWATER RECLAMATION PROJECT - FILE 262.0 (27-01)

By letter dated October 2, 2001, you request clarification regarding use of treated wastewater produced by the CAWD project in lieu of potable water supplies for purposes of developing new projects.

The Division of Water Rights (Division) addressed this issue in our letter of March 27, 1998. The March 27 letter states that it is acceptable to transfer a maximum of 380 acre-feet per annum of potable water supplies freed up through use of treated wastewater on the Del Monte Forest property for new purposes, provided that diversions from the Carmel River do not exceed 11,285 acre-feet per year plus the quantity of potable water provided to Pebble Beach Company and other sponsors under this entitlement for use on the Del Monte Forest properties. Continual records must be maintained, on both a monthly and total annual basis, to document that (a) the new use of potable water does not exceed the historic quantity of potable water provided by the California-American Water Company (Cal-Am) to the Del Monte Forest property and (b) the quantity of treated wastewater put to beneficial use equals or exceeds the potable water use. The Monterey Peninsula Water Management District is responsible for submitting these records to the Division on a quarterly basis, until full compliance with Order WR 95-10 is achieved.

You specifically asked whether the use of a portion of the original Pebble Beach Company water entitlement from the CAWD reclamation project can be used on non-Pebble Beach Company properties (1) within the Del Monte Forest and (2) outside the Del Monte Forest. Cal-Am may distribute the new potable water supply anywhere in its service area, subject to the Carmel River diversion requirements of Order WR 95-10, (and any subsequent modifications approved by the State Water Resources Control Board) and requirements (a) and (b) above.

Mr. Ernest A. Avila

2

OCT 18 2001

Katherine Mrowka is the staff person presently assigned to this matter. If you require further assistance, Ms. Mrowka can be contacted at (916) 341-5363.

Sincerely,

Edward C. Anton
for Edward C. Anton, Chief
Division of Water Rights

cc: Mr. Anthony Lombardo
Lombardo & Gilles, PLC
P.O. Box 2119
Salinas, CA 93902-2119

ATTACHMENT "D"



Terry Tamminen
Secretary for
Environmental
Protection

State Water Resources Control Board

Division of Water Rights

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FAX: 916.341.5400 • www.waterrights.ca.gov



Arnold Schwarzenegger
Governor

April 21, 2004

VIA FAX AND/OR MAIL

Mr. Anthony L. Lombardo
Lombardo and Gilles
P.O. Box 2119
Salinas, CA 93902-2119

Dear Mr. Lombardo:

USE OF RECLAIMED WASTEWATER FROM THE CARMEL AREA WASTEWATER DISTRICT/PEBBLE BEACH COMMUNITY SERVICES DISTRICT (CAWD/PBCSD) WASTEWATER RECLAMATION PROJECT - FILE 262.0 (27-01)

The Division of Water Rights (Division) has reviewed your March 2, 2004 letter regarding the expansion of the CAWD/PBCSD Wastewater Reclamation Facility. In your letter, you request the State Water Resources Control Board (SWRCB) to inform the Monterey Peninsula Water Management District (District) that the SWRCB does not object to the continued use of the "fixture unit" method of estimating water use for the unused portion of the 380 acre-feet potable water entitlement that resulted from the development of the reclamation project. Your request was precipitated by the District's consideration of an ordinance that would enable Pebble Beach Company to transfer a portion of its unused entitlement to other property owners in the Del Monte Forest. The SWRCB has neither received nor reviewed the proposed ordinance and is not prepared to offer comments on the proposed ordinance. Although the SWRCB believes that there may be better ways to determine consumptive water use, we do not object to continued use of the fixture unit method.

The Division requires the California-American Water Company (Cal-Am) to demonstrate compliance with Order WR 95-10. Cal-Am submits daily pumping records for each well in the Carmel River basin on a quarterly basis. The issue of whether Cal-Am is authorized to divert more than 11,285 acre-feet per annum (afa) (the Order WR 95-10 limit), based on exchanging use of treated wastewater from the CAWD facility with diversions from the Carmel River, was addressed in Division letters dated March 27, 1998 and October 18, 2001, which were attached to your March 2, 2004 correspondence.

Order WR 95-10 does not specifically address the use of 380 afa to offset the 11,285-afa limitations. However, the March 27, 1998 letter from Edward C. Anton, then Chief of the Division of Water Rights, indicated that the SWRCB would "use enforcement discretion to not penalize Cal-Am for excess diversion from the Carmel River as long as their diversions do not exceed 11,285 plus the quantity of potable water provided to the Pebble Beach Company and other sponsors under this entitlement for use on these lands." This enforcement discretion will

California Environmental Protection Agency

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Anthony L. Lombardo

- 2 -

April 21, 2004

continue to be exercised as long as the amount of treated wastewater delivered for use meets or exceeds the quantity of potable water delivered under the entitlement.

In order to accurately document that the historic level of diversion has not been exceeded, both Cal-Am and the District are required to provide certain information. Cal-Am must continue to measure and report all potable water diversions in monthly and total annual acre-feet. In addition, the District must report on the monthly and annual use of reclaimed water from the wastewater treatment project. The reclaimed water production amounts must be measured. The remainder of the entitlement, to the extent that it is offset by the delivery of reclaimed water, may be estimated using the "fixture unit method." The District must submit the information quarterly and also provide annual data for the water year. Your March 2 letter does not request a change from the requirement that the production of reclaimed water be measured. Cal-Am is required to accurately report to the SWRCB qualifying exemptions for diversions in excess of 11,285 afa. Cal-Am must also continue to provide daily diversion records with the final quarterly compliance report for the water year.

Katherine Mrowka is the staff person presently assigned to this matter. If you require further assistance, Ms. Mrowka can be contacted at (916) 341-5363.

Sincerely,



Victoria A. Whitney
Division Chief

cc: California-American Water Company
c/o Stuart L. Somach
Somach, Simmons & Dunn
Hall of Justice Building
813 Sixth Street, Third Floor
Sacramento, CA 95814-2403

Ms. Frances Farina
Monterey Peninsula Water Management District
P.O. Box 85
Monterey, CA 93942-0085

Steven Leonard
California-American Water Company
P.O. Box 951
Monterey, CA 93942-0951